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Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1952

No. 8

[illegible]

Petitioner,

v.

[illegible]

Respondent.

No. 9

[illegible]

Petitioner,

v.

[illegible]

Respondent.

No. 10

[illegible]

Petitioner,

v.

[illegible]

Respondent.

Motion for Leave to File Brief as Amicus Curiae and Brief for the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 973

EDWARD R. GAYLES, PETITIONER

v.

UNITED STATES OF AMERICA

No. 974

NATHANIEL SPURLARK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 975

DENNIS GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1288 Misc.

ARTHUR FAULKNER AND GLADYS DAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 327 F. 2d 715.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1964. Petitions for rehearing were denied on March 9, 1964. The petitions for writs of certiorari in Numbers 973, 974, and 975 were filed on April 7, 1964. As to Number 1288 Misc., Mr. Justice Brennan on March 16, 1964, extended the time for filing until April 11, 1964, on which day Mr. Justice Clark extended the time until April 12, 1964, a Sunday. The petition in Number 1288 Misc. was filed on April 13, 1964.

QUESTIONS PRESENTED

1. Whether the proof showed separate conspiracies (Nos. 974 and 975).

2. Whether in a trial for conspiracy to violate 21 U.S.C. 174, it was proper to instruct that knowledge of illegal importation might be presumed from evidence of actual or constructive possession (Nos. 974, 975).

3. Whether the trial judge properly refused to instruct that narcotics addiction was a matter bearing upon credibility of a witness, where he gave full general instructions on the issue of credibility (all petitions).

4. Whether it was error for the judge to charge, *inter alia*, that an attorney has no special status allowing him to commit a crime (No. 973).

5. Whether petitioner Gayles' attempts to frustrate the apprehension and prosecution of a co-conspirator occurred after attainment of the central purposes of the conspiracy (No. 973).

6. Whether various trial rulings were correct (No. 974).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, the five petitioners and one other were convicted on a one-count indictment charging a conspiracy to violate 21 U.S.C. 174 involving the concealment, purchase, and sale of illegally imported heroin. Petitioners Spurlark, Faulkner and Davis were sentenced to 10 years' imprisonment, and petitioners Green and Gayles to 5 years' imprisonment. The court of appeals affirmed all convictions on a consolidated appeal.

The government's evidence showed that petitioner Spurlark sold narcotics to various people in Chicago, Illinois, from 1951 to 1958 (A. 54–62, 178–183, 197–198, 200–202, 301–305).[1] Early in 1955, at a meeting attended by Spurlark, Green, and government witness Evans (who was a narcotics dealer), among others, it was decided that "Dennis Green was going to take over the sale of narcotics on the west side, and everybody who was buying stuff from over there would have to buy from Dennis Green" (A. 232). Shortly after that meeting, during which petitioners Green and Spurlark discussed the payment of fees for police protection, Green told Evans that he would have to pay $300 per month for protection (A. 244). In November or December of 1955, Evans and petitioner Faulkner, a competing west side narcotics dealer,

[1] "A." refers to the joint appendix in the court of appeals which is on file with the Clerk of this Court.

decided to merge. Faulkner called Green, and, after a discussion with Green during which the details were worked out, Evans and Faulkner combined. They immediately purchased from Green some $6,000 worth of narcotics which they eventually distributed for resale (A. 233).

In February 1956 petitioner Gayles, who was Spurlark's attorney, told Faulkner and Evans that the police were looking for them and that "it was real hot" (A. 234, 248, 249). As a result, Evans left town for about six weeks (A. 234–235). When he returned in April 1956, Evans purchased $3000 worth of heroin from Green for resale (A. 235). In June 1956, after the Evans-Faulkner arrangement had been terminated, Green told Evans of a shortage of supply in narcotics, but later reported that when petitioners Spurlark and Faulkner returned from a trip "the stuff was in" (A. 236). Green went to California for two months in 1956, and told Evans that Faulkner would be in charge of the business during Green's absence (A. 236–237).

Petitioner Gayles was an attorney and a former federal narcotics agent (A. 94, 316–317). Government witness Wilson (another narcotics dealer) testified that on Spurlark's direction he attended a meeting at Gayles' house in September or October 1954, at which Gayles was present and which had been called for the purpose of discussing the elimination of a narcotics competitor named "Big John" who had been taking business away from Spurlark (A. 91–93). In November 1954, Wilson—who had been told by Spur-

lark to call Gayles when in trouble (A. 94)—was represented by Gayles after having been arrested by the Chicago police, apparently for a narcotics violation (A. 93, 96, 112–113). After the case against Wilson was dismissed, Gayles told Wilson that he should use gloves when handling packages, and that he should be careful of the telephone and of tape recorders because "they are on to you now, and they will be trying to get you" (A. 96). In 1957 Gayles also assisted Evans in "fixing" a local charge after he consulted with Green (A. 245, 250).

Petitioner Davis sold narcotics in 1958 at the direction of Spurlark (A. 183) and was present during sales at an apartment to which Spurlark sent customers (A. 61–62, 303–304). On two occasions in 1958 Spurlark sent Davis to Detroit to collect money from a narcotics customer (A. 305–306).

ARGUMENT

1. There is no merit to the argument of Green and Spurlark that the evidence did not show a single conspiracy. While there is evidence that Spurlark and Green had once been competitors (A. 230), the record is replete with testimony showing that Green joined forces with Spurlark in 1955 and worked in concert with him thereafter. Faulkner and Evans were associated with Green on the west side and Davis worked directly for Spurlark. While distribution in different areas was handled by different people, the entire operation was part of one plan, with Gayles as adviser to the ring. The suggestion by Green that his activities were not tied to Gayles is refuted by testimony of the arrangement between

Spurlark and Green as well as by evidence that Gayles contacted Green about "fixing" a charge against government witness Evans, who was one of Green's customers (A. 250).

2. Petitioners Green and Spurlark contend that they had no knowledge of illegal importation and that it was error for the judge to instruct on the statutory presumption flowing from possession (Pet. No. 975, pp. 31–34; Pet. No. 974, pp. 14–15). It is, however, well settled that the presumption as to knowledge of illegal importation embodied in 21 U.S.C. 174 may be brought into play upon proof of actual or constructive possession of the narcotic, and there was in this case abundant proof of both actual and constructive possession by both petitioners. The present argument, which was not made at trial, is based upon an apparent misconception of the holding of *United States* v. *Massiah*, 307 F. 2d 62 (C.A. 2), certiorari granted on other issues, 374 U.S. 805. That decision does not stand for the proposition that it is reversible error to apply the presumption in a conspiracy case; on the contrary, it was the very absence of any instruction on importation—including the applicability of the presumption—with regard to the conspiracy which caused reversal in that case. Here, there were full instructions on the element of importation and on the presumption (A. 424, 426–427).

Nor is there substance to the suggestion that the statutory presumption does not apply to conspiracy cases. The statute itself refutes this argument since conspiracy is made an offense under 21 U.S.C. 174, and the courts have consistently treated the presump-

tion as applicable to conspiracies. See, *e.g.*, *United States* v. *Burrell*, 324 F. 2d 115 (C.A. 7), certiorari denied, 376 U.S. 937; *United States* v. *Paniça*, 290 F. 2d 97 (C.A. 2), certiorari denied, 363 U.S. 880; *Marcella* v. *United States*, 285 F. 2d 322 (C.A. 9), certiori denied, 366 U.S. 911.

3. Some government witnesses, including Evans and Wilson, had been narcotic addicts at the time of the events in question. All petitioners maintain that the trial judge should have given a particularized instruction as to the assumed effect of narcotics addiction on credibility.[2] There is, however, no evidence in the record concerning the effect of addiction on credibility, and there is no medical consensus on the issue. See *Kelly* v. *Maryland Casualty Co.*, 45 F. 2d 782 (W.D. Va.), affirmed, 45 F. 2d 788 (C.A. 4), where the court extensively analyzed legal and medical authorities; see also *Weaver* v. *United States*, 111 F. 2d 603 (C.A. 8).[3] Consequently, there was no reason for

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[2] The requests are found at A. 442–443. The requests were made by petitioners Faulkner and Gayles and concurred in by petitioner Spurlark (A. 439). We treat the question as applicable to all petitioners.

[3] *Fletcher* v. *United States*, 158 F. 2d 321 (C.A. D.C.), relied upon by petitioners, dealt with an entirely different situation. The witness in that case was a *paid* informer who was also an addict, and the court held that on the facts it was error not to instruct "that the informer's testimony should be examined by the jury with greater scrutiny and care than the testimony of an ordinary witness." In the instant case there was no evidence that any addict witness was acting for the government when the events occurred. Moreover, the court here did instruct that the jury might consider anticipated rewards or promises of immunity as bearing upon the credibility of witnesses (A. 420–421).

the district court to give undue emphasis to this one debatable element of credibility by singling it out in an instruction.[4] As Professor McCormick concludes (*Handbook of the Law of Evidence* (1954), pp. 98–99):

> It can hardly be contended that there is such scientific agreement as to warrant judicial notice that addiction of itself usually affects credibility.

4. Complying with Gayles's request, the judge told the jury that a lawyer's representation of conspirators in prior narcotics cases did not alone supply evidence of guilt; that a lawyer is bound to present all defenses; and that a lawyer need not reveal to authorities any information disclosed to him by clients (A. 431–432). To this instruction the judge added the following paragraph (A. 432):

> You are not to infer from the foregoing however, that an attorney has any special status which permits him to perform an unlawful act, or to join an unlawful conspiracy, nor may he knowingly assist a client to commit an unlawful act or to further an unlawful conspiracy.

The qualifying paragraph is a correct statement properly added by the court to the proposed instruction

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[4] Petitioner Green also attacks that portion of the instructions relating to a presumption that a witness tells the truth, relying on language in *Knapp* v. *United States*, 3[illegible] F. 2d 794 (C.A. 5). The short answer to the contention is that the point was not raised at trial and therefore is not cognizable on appeal, which is precisely what *Knapp* held. Moreover, whatever may be said for the instruction, the instant case—unlike *Knapp*—was not one where the only witnesses were those for the government. Indeed, petitioner Green himself was a witness; thus it could not possibly be argued here that the "presumption" instruction was tantamount to a directed verdict of guilty.

so as not to leave an erroneous impression in the jury's mind that an attorney was beyond the ambit of the criminal law. A judge may properly qualify a requested instruction to make it accurate. See *Johnson alias Overton* v. *United States*, 157 U.S. 320, 325.

5. Gayles' efforts to warn Evans, a Green-Spurlark customer, to leave town when police were looking for him in February 1956 and to fix his case in August 1957 occurred while the central purposes of the conspiracy were being executed. The record shows that after Evans returned from hiding in April 1956 he continued to purchase narcotics from Green and Faulkner until 1959 (A. 234–239). Gayles' activities were consequently in furtherance of the conspiracy insofar as they protected Evans—one of the conspiracy's dealers—from arrest and confinement. *Grunewald* v. *United States*, 353 U.S. 391, and like cases dealing with concealment activities occurring after the central object of the conspiracy had been accomplished are clearly distinguishable on this ground.

6. a. There is no merit to the contention of petitioner Spurlark that the testimony of Mrs. Wilson should have been stricken because of the destruction of notes which were used to prepare an interview report. Since the report itself was made available (A. 146), petitioner can have no complaint. *Campbell* v. *United States*, 373 U.S. 487; *Killian* v. *United States*, 368 U.S. 231, 242.

b. Spurlark also argues that he was prejudiced by the destruction of certain exhibits (Pet. No. 974, p. 15) which, although not clearly described (A. 159–160), apparently were actual narcotics obtained by an agent from Willard Jones, a co-defendant. The

"destruction" is not shown by the record, but in any event it is settled that neither the best evidence rule nor any other rule requires production of the actual narcotics about which a witness testifies. See *Francis* v. *United States*, 239 F. 2d 560 (C.A. 10); *Lebron* v. *United States*, 241 F. 2d 885 (C.A. 1), certiorari denied, 354 U.S. 911.

c. Finally, the trial judge did not commit error in allowing the interruption of the witness Evans and the calling of agent Valentine in order to settle a question which had arisen in the course of Evans' testimony—whether or not Valentine had been present in the grand jury room when Evans testified. The court felt that Evans' testimony on the matter was "not so clear" and that testimony from Valentine would be desirable. (A. 263). It was well within the area of the court's discretion to resolve this question which might have revealed the presence of an unauthorized person in the grand jury room and required dismissal of the indictment—as quickly as possible.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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